Supreme Court, U.S.
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No: 04 349

In The Supreme Court of the United States

HERBERT S. GASS, JR., *et al.*,

Petitioners,

v.

COUNTY OF ALLEGHENY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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I. QUESTION PRESENTED FOR REVIEW

1. Whether the Tax Injunction Act (28 U.S.C. §1341) bars the Federal Courts from taking jurisdiction of a suit filed under 42 U.S.C. §1983 when the alleged deprivation of constitutional of rights occurs in an administrative appeal hearing arising from a property assessment valuation.

II. PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners:

HERBERT S. GASS, JR.

JOHN ZITELLI

DIANE ZITELLI

JEFF CORSELLO

LYNN CORSELLO

ROBINHILL DEVELOPMENT COMPANY,

Respondents:

COUNTY OF ALLEGHENY, PENNSYLVANIA

BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW OF ALLEGHENY COUNTY

KEVIN MCKEEGIN, an individual and Board member

PATRICIA MCCULLOUGH, an individual and Board member

JERRY SPEER, an individual and Board member

JAMES SKINZER, an individual and Board member

DEBORAH BARON, an individual and Board member

FREDERICK VALENCENTI, an individual and Board member

III. CORPORATE DISCLOSURE STATEMENT

Petitioner Robinhill Development Corporation is not a parent or publicly held corporation and no parent or publicly held corporations owns 10% or more of its stock.

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(i) Date the Order Sought to be Reviewed was Entered: June 10, 2004

(ii) Dates of Orders Respecting Rehearing, and Date and Terms of Orders Granting Extensions of Time to File Petition for Certiorari: Not Applicable.

(iii) Statement Respecting Rule 12.5 Concerning Cross-Petitions: Not Applicable.

(iv) Statement of the Statutory Provision Believed to Confer on the Supreme Court of the United States Jurisdiction to Review Writ of Certiorari: 28 USC §1254:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

(vi) Statement of Notifications Required by Rule 29.4 (b) and (c):

Rule 29.4 (b): 28 U.S.C. § 2403(a) may apply to this case. The United States Court of Appeals for the Third Circuit, by letter dated October 8, 2003, certified to the Office of the Solicitor General of The United States that the constitutionality of an Act of Congress (28 U.S.C. § 1341) was drawn into question.

Rule 29.4(c): Not Applicable.

VIII. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

1. Constitutional Provisions.

United States Constitution, Amendment 5:

> No persona shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment 14, section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Federal Statutes.

28 U.S.C. § 1341.

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. Federal Rules of Civil Procedure.

FRCP 12(b)

> How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

4. State Statutes.

Act of May 22, 1933, P.L. 853, art. II, § 201, 72 P.S. § 5020-201(a), as amended.

Subjects of taxation enumerated

The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:

(a) All real estate, to wit: Houses, house trailers and mobilehomes buildings permanently attached to land or connected with water, gas, electric or sewage facilities, buildings, lands, lots of ground and ground rents, trailer parks and parking lots, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, all office type construction of whatever kind, that portion of a steel, lead, aluminum or like melting and continuous casting structures which enclose, provide shelter or protection from the elements for the various machinery, tools, appliances, equipment, materials or products involved in the mill, mine, manufactory or industrial process, and all other real estate not exempt by law from taxation. Machinery, tools, appliances and other equipment contained in any mill, mine, manufactory or industrial establishment shall not be considered or included as a part of the real estate in determining the value of such mill, mine,

manufactory or industrial establishment. No office type construction of whatever kind shall be excluded from taxation but shall be considered a part of real property subject to taxation. That portion of a steel, lead, aluminum or like melting and continuous casting structure which encloses, provides shelter or protection from the elements for the various machinery, tools, appliances, equipment, materials or products involved in the mill, mine, manufactory or industrial process shall be considered as part of real property subject to taxation. No silo used predominantly for processing or storage of animal feed incidental to operation of the farm on which it is located, no free-standing detachable grain bin or corn crib used exclusively for processing or storage of animal feed incidental to the operation of the farm on which it is located and no in-ground and above- ground structures and containments used predominantly for processing and storage of animal waste and composting facilities incidental to operation of the farm on which the structures and containments are located, shall be included in determining the value of real estate used predominantly as a farm: Provided, That for the tax or fiscal year beginning on or after the first day of January, one thousand nine hundred fifty-eight, eighty per centum of the assessed value of any such machinery, tools, appliances and other equipment located in counties of the second class as well as in all cities of the third class, boroughs, townships, school districts of the second, third and fourth class, and institutional districts in

counties of the second class, shall be considered and included in determining the value of such mill, mine, manufactory or industrial establishment: Provided further, That for the tax or fiscal year beginning on or after the first day of January, one thousand nine hundred fifty-nine, sixty per centum of the assessed value of any such machinery, tools, appliances and other equipment located in said political subdivisions, shall be considered and included in determining the value of such mill, mine, manufactory or industrial establishment: Provided further, That for the tax or fiscal year beginning on or after the first day of January, one thousand nine hundred sixty, forty per centum of the assessed value of any such machinery, tools, appliances and other equipment located in said political subdivisions, shall be considered and included in determining the value of such mill, mine, manufactory or industrial establishment: Provided further, That for the tax or fiscal year beginning on or after the first day of January, one thousand nine hundred sixty-one, twenty per centum of the assessed value of any such machinery, tools, appliances and other equipment located in said political subdivisions, shall be considered and included in determining the value of such mill, mine, manufactory or industrial establishment: Provided further, That for the tax or fiscal years beginning on or after the first day of January, one thousand nine hundred sixty-two, no portion of the value of any such machinery, tools, appliances and other equipment regardless of where located, shall be considered and

> included in determining the value of such mill, mine, manufactory or industrial establishment: Provided further, That nothing contained in this section of this act shall be construed as an intent to provide for the valuing and assessing and subjecting to taxation for purposes of any city of the second class or any school district of the first class A any such machinery, tools, appliances and other equipment: And provided further, That such exclusion of silos used predominantly for processing or storage of animal feed incidental to operation of the farm on which the silo is located shall be included in determining the value of real estate used predominantly as a farm shall become effective for taxes to be levied for the tax or fiscal year beginning on or after the first day of January, one thousand nine hundred seventy-four: And provided further, That such exclusion of free-standing detachable grain bins and corn cribs used exclusively for processing or storage of animal feed incidental to operation of the farm on which the grain bin or corn crib is located shall become effective in determining the value of real estate used predominantly as a farm for taxes to be levied for the tax or fiscal year beginning on or after the first day of January, one thousand nine hundred eighty-five. No amusement park rides shall be assessed or taxed as real estate regardless of whether they have become affixed to the real estate.

Act of June 21, 1939, P.L. 626, § 4, as amended (72 P.S. § 5452.4).

Powers and duties of board.

The Board of Property Assessment, Appeals and Review shall have power and its duty shall be:

(a) To make and supervise the making of all assessments and valuations of all subjects of taxation in the county as required by existing law.

(a.1) The board shall assess real property at a value based upon an established predetermined ratio which may not exceed one hundred percent (100%) of actual value. Such ratio shall be established and determined by the board of property assessment, appeals and review after proper notice has been given. In arriving at actual value the county may utilize the current market value or it may adopt a base year market value.

(a.2) In arriving at actual value, the price at which any property may actually have been sold, either in the base year or in the current taxable year, shall be considered but shall not be controlling. In arriving at the actual value, all three methods, namely, cost (reproduction or replacement, as applicable, less depreciation and all forms of obsolescence), comparable sales and income approaches, must be considered in conjunction with one another.

(a.3) The board shall apply the established predetermined ratio to the actual value of all real property to formulate the assessment roll.

(b) To revise and equalize all such assessments and valuations.

(c) To hear all cases of appeals from assessments, and all complaints as to assessments, errors, exonerations and refunds.

(d) To pass upon and determine the amount of property of any organization or institution which is under the provisions of existing law entitled to exemption from taxation.

(e) To establish and maintain in its office records of cubical contents of buildings, surveys, maps, sales and assessments and with the exception of the cubical contents, records and sales records, to permit inspection thereof by the public at all times during office hours.

(f) To perform and exercise all the powers and duties heretofore imposed or conferred upon the board for the assessment and revision of taxes in counties of the second class under the provisions of any existing law not repealed hereby.

(g) To perform and exercise such other powers and duties as may be conferred or imposed upon it by the provisions of this act or any other act of Assembly.

5. Allegheny County Ordinances.

Administrative Code of Allegheny County, Ordinance No. 63-03-OR, § 5-207.01

New Board of Property Assessment Appeals and Review created; purposes.

There is hereby created as an agency of the County to become effective September 1, 2000, a new "Board of Property Assessment Appeals and Review" hereinafter referred to as the "Appeals Board." The previous Board of Property Assessment, Appeals and Review is abolished. The purpose of the Appeals Board shall be to:

A. Hear and decide all appeals concerning the valuations of parcels of real property within the County; and

B. Hear and decide all appeals of determinations of the tax exempt status of any parcel or real property within the County.

IX. STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction in the court of first instance.

This case involves a claim of deprivation of the due process rights guaranteed by the Fifth Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment thereto. Petitioners invoked the jurisdiction of the United States District Court below pursuant to 42 U.S.C. § 1983, inasmuch as the Respondents deprived them of the aforesaid Constitutional rights under color of state law. The question presented for review is

whether the courts below erred by holding that the Tax Injunction Act, 28 U.S.C. § 1341, precludes review of any deprivation of Constitutional rights in connection with the process of appealing a property tax assessment, even if the governmental body causing the deprivation is a quasi-judicial body having no power to assess, levy or collect taxes.

B. Statement of Facts

In June of 2000, prior to conducting its 2001 county-wide reassessment, Allegheny County, enacted a new Administrative Code, pursuant to which the former Board of Property Assessment, Appeals and Review was replaced by two separate bodies. The first of these bodies, the Office of Property Assessment (the "OPA"), was charged with the duty of assessing all real property in the county and determining which properties were exempt from taxation under applicable state law. The second body, the Board of Property Assessment, Appeals and Review (the "BPAAR"), was charged solely with hearing and deciding appeals from the valuations placed upon properties by the Office of Property Assessment and appeals from determinations regarding property exemption.

In 2001, the OPA conducted a county-wide reassessment of all properties, which, in turn, resulted in nearly 100,000 appeals. Pennsylvania law and Allegheny County Ordinances provide that, after the completion of a county-wide reassessment, any aggrieved property owner may file an appeal of the assessed value to the BPAAR. The BPAAR will hold a quasi-judicial hearing, where witnesses are placed under oath, on the taxpayer's challenge to the OPA's valuation and assessment. Administrative Code of Allegheny County, § 5-207.01 and 72 P.S. 5452.4(a.3)(c).

In response to the unusually high volume of appeals in 2001, Allegheny County hired a number of hearing officers to listen to the evidence and to recommend an opinion of value to the BPAAR. BPAAR was to provide oversight and guidance to its hearing officers. Petitioners alleged in the courts below, that in a memo to its hearing officers, BPAAR authorized the hearing officers and/or review officers to search for and introduce new evidence into the record after the close of the hearing, on an *ex parte* basis, without providing the property owners with any notice or opportunity to respond to the after-acquired evidence. Petitioners alleged, further, that in some cases, the *ex parte* evidence obtained by the hearing officers influenced their determinations and in other cases, that evidence influenced the BPAAR, itself.

C. Procedural History

Petitioners filed a civil action, under 42 U.S.C. §1983 in the United States District Court for the Western District of Pennsylvania, seeking, *inter alia*, among other relief, a declaratory judgment that the BPAAR's *ex parte* evidence gathering procedures violated, under color of state law, Petitioners' right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

Respondents filed a motion to dismiss for lack of jurisdiction under FRCP 12(b), arguing that the Tax Injunction Act (hereinafter "TIA")(28 U.S.C. §1341) deprived the federal courts of subject matter jurisdiction over Petitioners' civil action. Respondents argued that the instant action would, if heard by the district court, impair the assessment, levy and collection of taxes under state law because the BPAAR's determination of value ultimately determines assessed values, which in turn, affects the amount of tax revenue that local taxing bodies ultimately collect.

Petitioners disagree with Respondent's argument for several reasons. First, the Board of Property Assessment, Appeals and Review is a quasi-judicial board whose stated purpose is to "hear and decide all appeals concerning the valuations of parcels of real estate within the County." The BPAAR's function is not to assess, levy or collect tax revenue. It is limited to hearing appeals only. The County Assessment Office makes the assessment and the County Treasurer's office levies and collects the property tax.

Moreover, Petitioners note that at the time an assessment appeal is filed in Allegheny County (a second class county), the taxing bodies have already collected their property tax revenue. Therefore, an appeal of the assessed value to the BPAAR or the Court of Common Pleas does not impair Respondent's ability to levy, assess and collect property taxes as the taxes have already been collected. In this case, Petitioners merely seek to enforce their right to due process and to a fair hearing in the assessment appeals process.

The District Court assigned Respondents' motion to a magistrate judge, who issued a report and recommendation in support of granting Respondents' motion to dismiss. The District Court adopted the report and recommendation of the magistrate judge and issued its order dismissing Petitioner's civil action. Petitioners appealed the United States Court of Appeals for the Third Circuit, which issued an opinion affirming the order of the District Court. Petitioners now seek review by this Court on the basis that the issue presented is one of national importance which has not previously been decided by this Court.

X. ARGUMENT

I. Petitioners' procedural due process claims regarding unlawful *ex parte* evidentiary procedures following Allegheny County property assessment appeal hearings constitute appropriate subject matter for a Civil Action under 42 U.S.C. §1983, and the Tax Injunction Act, 28 U.S.C. §1341, does not bar federal court jurisdiction of those claims.

A. As set forth in Rule 10(c) of the Supreme Court Rules, the Court of Appeals for the Third Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decision of this Court.

The specific issue raised in this appeal was a matter of first impression for the Third Circuit. Petitioners have not found any case where the TIA was raised as a defense to a deprivation of due process claim in a property assessment appeal but have found cases in other jurisdictions in which the TIA has been discussed as it relates to other tax issues or to the validity of the tax itself.

As property taxes are imposed in every state, the issues raised in this appeal will affect property owners and local taxing bodies nationwide.

B. The Tax Injunction Act Does Not Bar All Litigation that Involves Taxes Under State Law.

The issue to be determined in this appeal is whether the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, bars a federal court from taking subject-matter jurisdiction when

the petitioners contend that the appeals process, rather than the tax itself, is unconstitutional. The district court determined that the TIA prevented it from taking subject-matter jurisdiction and dismissed the Complaint and the Court of Appeals affirmed the dismissal.

Petitioners herein are neither challenging the validity of the property tax itself nor are they challenging Allegheny County's authority to assess, levy and collect property taxes. The appeals process is separate and distinct from the assessment and collection of property taxes. This is evident from the separate checks and balances built into the assessment system. The County Assessment Office initially fixes the assessment. The County Treasurer's Office collects the tax. After the tax has been collected, aggrieved property owners and local taxing bodies have the opportunity to file appeals with respect to the assessed value placed on the property.

The plain language of the TIA reveals that it is not applicable under the facts of the instant case. The TIA provides as follows:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. Petitioners are not asking the district court to "enjoin, suspend or restrain the assessment, levy or collection of any tax. They are merely asking that the district court issue a declaratory ruling directing that, in the appeals process, Allegheny County provide all appellants with the procedural due process guaranteed by the United State Constitution. The reported cases support this position.

In Garrett, et al, v. Bamford, et al., 538 F.2d 63 (3d Cir. 1976) (Garrett I), the United States Court of Appeal for the Third Circuit held that the TIA did not bar the federal courts from taking subject-matter jurisdiction where the plaintiffs had asked the district court to impose an injunction preventing the local taxing bodies from collecting a tax. In Garrett I, the plaintiffs alleged a Fourteenth Amendment Equal Protection claim by stating that, as minorities, they bore an unfair proportion of the tax burden. In Garrett I, the Third Circuit Court found that Pennsylvania's court decisions at that time made it uncertain that plaintiffs would have an efficient remedy in the state courts. Thus, it held that the TIA did not preclude federal court jurisdiction.

The point of raising Garrett I, is threefold. First, it shows that the TIA is not an absolute bar to federal court jurisdiction in all cases involving property assessments. Second, it shows that constitutional challenges are a valid basis for federal court jurisdiction, even when property taxes are at issue. Finally, in Garrett I, the Third Circuit Court reviewed the legislative history of the TIA and found that the purpose of the TIA was to prevent the practice of "large out of state corporations from using diversity jurisdiction to litigate the validity of state taxes in federal courts." Id., 538 F.2d at 66. As stated above, Petitioners are not challenging the validity of Pennsylvania's property tax or the method or manner of its collection. Rather, they are seeking declaratory relief to ensure that their constitutional right to due process during an appeal is maintained, whether that appeal is before an administrative board or the state courts.

In Garrett, et al. v. Bamford, et al., 582 F.2d 810 (3d Cir. 1978) (Garrett II), the Third Circuit Court held that Pennsylvania had adequately cured its Third Class County Assessment statute by adding provisions allowing a class

action suit to be filed, whereas the prior statute had limited appeals to challenges by individual taxpayers. Id. at 813-814. Thus, the Third Circuit Court found that the Garrett II plaintiffs now had an efficient and speedy remedy in state court.

In comparing the instant case to Garrett I & II, it must be kept in mind that the plaintiffs in Garrett were seeking a different form of injunctive relief than Petitioners herein. In both Garrett cases, the plaintiffs sought to have a prohibitive injunction to prevent Berks County from levying and collecting real estate taxes. The federal court took jurisdiction because it found that plaintiffs did not have an efficient and speedy remedy in state court. In contrast, Petitioners in the case at bar are merely seeking declaratory relief as to the procedures to be used in an appeal hearing. Petitioners are not seeking a prohibitive injunction involving the restraint of assessing, levying or collecting the property tax.

Petitioners respectfully submit that Congress intended for the TIA to only apply to the legislative function of collecting taxes. Article I, Section 8 of the United States Constitution, authorizes Congress "to lay and collect taxes..." Congress drafted the TIA with similar language. To wit: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax..." Clearly, by the words of the TIA itself, Congress intended the TIA to be limited to the legislative function of collecting taxes.

Article III of the United States Constitution provides for the judiciary, a separate branch of government, to provide a check and balance of our system of government. An appeal from a tax assessment, whether to a quasi-judicial body such as the BPAAR or to the Courts, triggers a transfer from the legislative branch of government to the judicial

branch. Congress never intended the TIA to deprive appellants of a fair hearing or to interfere with the judicial branch. When a court determines the correct assessed value of an appellant's property, such determination constitutes a judicial function. The federal courts should not be precluded from ensuring that this function is carried out fairly so that parties are afforded the due process guaranteed them by the United States Constitution.

In another due process case, the United States District Court for the Middle District of Pennsylvania held that the TIA did not bar an employer's claim for injunctive relief when the employer complained that its due process rights were violated by a state statutory scheme which authorized the payment of unemployment compensation to striking workers before entitlement to those benefits were ultimately decided on appeal. USX Corporation v. Pennsylvania Department of Labor and Industry, 643 F.Supp. 1567, 1570 (M.D. Pa. 1986). The Court in USX, however, decided not to issue injunctive relief for other reasons.

Most recently, this Court affirmed the Ninth Circuit's holding that TIA did not apply to bar jurisdiction over a plaintiff's §1983 action challenging, on First Amendment grounds, an Arizona statute that permitted a state income tax credit to taxpayers who contribute money to a School Tuition Organization ("STO") that made scholarship grants to students attending private religious-based schools. Hibbs v. Winn, ___ U.S. ___, 124 S. Ct. 2276, 159 L. Ed .2d 172 (2004). The Court examined the TIA's legislative history, and found that Congress had enacted TIA primarily to stop taxpayers who lived outside a subject state from using the diversity jurisdiction of the United States District Courts to gain advantages over taxpayers who lived in the subject state. Id., 124 S. Ct. at 2288. The Supreme Court stated in Hibbs that:

> Just as the AIA shields federal tax collections from federal-court injunctions, so the TIA shields state tax collections from federal-court restraints. ...Congress directed taxpayers to pursue refund suits instead of attempting to restrain collections. Third-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs*, ...are outside Congress' purview.

Id. at 2287 (emphasis in original). Thus, the Court in Hibbs, supra, held that the TIA did not bar the plaintiffs' civil rights action against an Arizona state income tax provision that ostensibly violated the Establishment Clause of the First Amendment.

Similarly, the TIA should not bar the action of Petitioners herein challenging unlawful *ex parte* evidence procedures that violate their due process rights under the Fifth and Fourteenth Amendments. Petitioners do not seek to stop the collection of taxes or to avoid paying them. Rather, Petitioners seek a fair hearing before a quasi-judicial body in what is essentially a refund suit. Under the Hibbs, supra, standard, the United States District Court should entertain jurisdiction of this matter.

C. The due process rights of Petitioners to a fair hearing in the first instance constitute a fundamental constitutional right, and the Third Circuit Court's decision to the contrary conflicts directly with this Court's decision in Ward v. Monroeville.

Respondents have argued that, even if the Petitioners herein were denied a fair hearing, the appeals process permits a *de novo* review to the Court of Common Pleas which would cure any constitutional violation in the first appeal. This argument must fail as Petitioners are entitled to a fair hearing in every step of the appeals process.

This Court, in Ward v. Monroeville, 409 U.S. 57, 93 S. Ct. 80 (1972), expressly recognized this basic legal principle:

> Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial *de novo* in the County Court of Common Pleas. We disagree. This "procedural safeguard" does not guarantee a fair trial in the [trial] court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable because that State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

409 U.S. at 61-62 (emphasis added).

Procedural due process rights to a fair hearing in the first instance have an equally compelling basis as the right to freedom from government action establishing religion, freedom from government action that restrains a free press, freedom from racial discrimination, and the right to benefit from a consistently applied legal system under the Supremacy Clause. This Court so held in Ward v. Monroeville, 409 U.S. 57 (1972). In Ward, supra, a town mayor, who sat as traffic court judge solely at initial hearings, only was only paid when a defendant was found guilty. The town realized a significant part of its revenue from traffic fines, so much so that it hired a consulting firm for advice on increasing that revenue after it had declined. Id. at 58. An aggrieved defendant had the right to appeal the mayor's decision and have a trial *de novo* in a state trial court of original jurisdiction. This Court, nevertheless, held that the mayor had a conflict of interest that prevented him from serving as an impartial judge in accordance with defendant's due process rights, and that defendant had the

right to a fair hearing "in the first instance" notwithstanding the right of appeal later to an impartial court. Id. at 62; (emphasis added).

In the instant case, Respondent argued, and the Third Circuit Court found, contrary to the rights guaranteed by Ward, supra, to a fair hearing in the first instance, that the right to appeal a decision based on unlawful *ex parte* evidence satisfied Petitioners' rights. Under the Allegheny County local rules, a party aggrieved by a decision of Respondent may appeal to the state trial court, the Allegheny County Court of Common Pleas. By administrative order, the trial court then appoints the Board of Viewers, as special master, to hold a record evidentiary hearing and issue a Report and Recommendation of the Special Master. An aggrieved party may thereafter file exceptions to the Special Masters' recommendation where the issues are submitted on briefs to the trial court. Allegheny County Local Rule A 503.

The Third Circuit cited Rosewell v. La Salle National Bank, 450 U.S. 503, 101 S. Ct. 1221 (1981), where this Court held that a later appeal and refund process which took two years for a taxpayer to get a refund of overpaid real estate taxes constituted a "plain, speedy and efficient remedy" under TIA. However, Rosewell involved merely the time and inconvenience of waiting two years for a refund in case of errors in a system presumptively fair and protective of due process. It did not involve a system of unconstitutionally unfair hearings based on improper *ex parte* evidence as does the instant case.

Many other cases have recognized the primacy of Constitutional guarantees of procedural due process rights. Gibson v. Berryhill, 411 U.S. 564, 93 S. Ct. 1689 (1973) held that the members of the Alabama Board of Optometry had failed to provide a fair hearing in license revocation cases

involving optometrists. Similarly, Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 106 S. Ct. 1580 (1986), reversed a state supreme court decision affirming a trial court's dismissal of a civil action against an insurance company where a state supreme court justice had had a conflict of interest respecting the insurance company but had failed to recuse himself. Finally, the Pennsylvania Supreme Court has held that a physician had a fundamental right to a fair hearing by an impartial body in disciplinary hearings. Lyness v. Commonwealth State Board of Medicine, 529 Pa. 535, 605 A.2d 1204 (1992).

Like the appellants in those cases, petitioners have the fundamental due process right to a fair hearing. Moreover, under Ward, supra, they possess that right at each and every step of the adjudicative process. The BPAAR's use of *ex parte* evidence after the close of hearings to increase assessments clearly denies petitioners that fundamental right. The Third Circuit Court erred in failing to follow controlling authority of Ward, supra, and the other cases that have recognized and protected petitioners' due process rights.

II. Appellants, under circumstance currently existing and likely to persist in the foreseeable future, have no plain, adequate and speedy remedy under Pennsylvania state law or in any proceeding in a Pennsylvania state court.

In a state action simultaneous to that of Petitioners' herein, other Allegheny County real property owners brought a 42 U.S.C. §1983 claim in state court claiming the same deprivation of due process arising out of the use of *ex parte* evidence at assessment appeal hearings. See Kowenhoven v. County of Allegheny, 847 A.2d 172 (Pa. Cmwlth 2004). In that case, the Pennsylvania Commonwealth Court denied injunctive relief and held that the appeal *de novo* afforded appellants an adequate remedy,

despite the United States Supreme Court's holding in Ward, supra. The majority in Kowenhoven distinguished Ward from the instant case by stating that, in Ward, the court was concerned about an ordinance which was invalid on its face, while the facts of the instant case did not involve an ordinance which was facially invalid. Id. at 175. Rather, the instant case included a memo which allegedly directed hearing officers to deprive petitioners of their constitutional rights.

Petitioners herein disagree with the majority opinion in Kowenhoven, supra, and argue that notions of due process and fair play should not be tolerated whether the violation arises from a facially invalid statute or comes from an formal memorandum directing procedures which violate due process. Moreover, the mere fact that the Commonwealth Court denied plaintiffs relief in Kowenhoven shows that Petitioners herein do not have a plain, speedy and efficient remedy at state law.

Judge Friedman's dissent in Kowenhoven points out reasons that the majority on Commonwealth Court did not correctly analyze the adequacy of a Board of Viewers appeal as an adequate remedy. First, she pointed out that the Board of Viewers procedure exists primarily to correct erroneous valuation determinations, not to correct legal or constitutional violations such as improper use of *ex parte* evidence. Id. at 178-179. Second, Judge Friedman pointed out the disinclination of the Pennsylvania Supreme Court to review constitutional issues in property assessment appeals, citing two prior denials of allowance of appeal. Id. at 179. Finally, at footnote 2, Judge Friedman states Petitioners' concerns as follows:

> Ironically, the majority, in dicta, appears to have decided the due process question, commenting on the Board's memo with these words: "Such a

> process appears to fly in the face of procedural due process notions." (Majority op. at 4-5.) Later, the majority states that "the Board's memo... injected an improper element into the process of adjudication." (Majority op. at 7.) Such remarks leave little doubt that the Board's process is constitutionally deficient.

Id. at 178.

In 2001, the Allegheny County reassessment created both the due process rights violations based on improper *ex parte* evidence, and the current Pennsylvania state court judicial climate denies Petitioners a plain, adequate and speedy remedy under state law or in state court. Respondent faced record numbers of assessment appeals by angry taxpayers. The ostensible form of remedy for aggrieved taxpayers, a *de novo* hearing before a Board of Viewers, institutionally lacks the kind of expertise necessary to afford a remedy to correct the rights violations. Additionally, Ward held that taxpayers have the right to a fair hearing in the first instance, not merely in some prospective appeal. The state trial court and the Commonwealth Court in Kowenhoven refused to provide taxpayers with relief and with a remedy to enforce their due process rights, and the Pennsylvania Supreme Court has repeatedly declined to review constitutional challenges in the property tax assessment appeal process. For those reasons, Petitioners lack any plain, adequate or speedy state law or state court remedy.

III. The Tax Injunction Act is Unconstitutional.

To the extent that the TIA is determined to be applicable, Petitioners argue that the TIA is unconstitutional if it is applied in a manner which deprives Petitioners of a forum to address the deprivation of their constitutional rights to procedural due process. Congress cannot legislate

away a citizen's constitutional rights. A statute which deprives one of his or her constitutional rights is unenforceable. Jordan, et al. v. Fox, Rothschild, O'Brien & Frankel, et al., 20 F.3d 1250 (3d Cir. 1994).

XI. CONCLUSION

The TIA does not deprive the federal courts from taking subject-matter jurisdiction as it will not impair Allegheny County's ability to assess, levy or collect property taxes. Furthermore, Congress intended that the TIA only apply to the legislative function of tax collection and not the judicial review process. Notwithstanding the fact that the matter in controversy involves real estate taxation, the validity of the tax itself is not being challenged by Petitioners. Rather, Petitioners section 1983 action seeks declaratory relief limited to the appeals process, costs and reasonable attorney fees. Alternatively, if the TIA can only be interpreted in a way that deprives petitioners of their right to procedural due process before a quasi-judicial body, that statute is unconstitutional.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-2679

HERBERT S. GASS, JR.; JOHN ZITELLI, an individual; DIANE ZITELLI, his wife; JEFF CORSELLO, an individual; LYNN CORSELLO, his wife; MICHAEL LEAHY, an individual; DOMENIC DIPILATO, an individual; ANNA DIPILATO, his wife; ROBINHILL DEVELOPMENT COMPANY

v.

COUNTY OF ALLEGHENY, PENNSYLVANIA; BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW OF ALLEGHENY COUNTY; KEVIN MCKEEGIN, an individual; PATRICIA MCCULLOUGH, an individual; JERRY SPEER, an individual; JAMES SKINZER, an individual; DEBORAH BARON, an individual; FREDERICK VALENCENTI, an individual

Herbert S. Gass, Jr.; John Zitelli; Diane Zitelli; *Jeff Corsello; *Lynn Corsello; Robinhill Development Company,

Appellants

(* Per Amended Notice of Appeal filed 6/12/03)

On Appeal from the United States District Court for the
Western District of Pennsylvania
(D. C. Civil No. 02-cv-01394)
District Judge: Hon. Joy F. Conti

[ENTERED: JUNE 10, 2004]

Argued January 12, 2004

Before: SLOVITER, RENDELL, and ALDISERT, Circuit Judges

(Filed June 10, 2004)

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OPINION OF THE COURT

SLOVITER, Circuit Judge.

Appellants, property-owning taxpayers in Allegheny County, filed this suit asserting that the Allegheny County Board of Property Assessment, Appeals and Review (the Board) has adopted a policy, custom or practice in processing appeals from property tax assessments that violates their rights to due process. The District Court dismissed this action for lack of subject-matter jurisdiction because of the Tax Injunction Act, 28 U. S. C. § 1341. Because the Tax Injunction Act deprives federal courts of jurisdiction

to review challenges to a state property tax system where the state provides a plain, speedy and efficient remedy, we will affirm the decision of the District Court.

I.

Appellants, Herbert S. Gass, Jr., John and Diane Zitelli, Jeff and Lynn Corsello, Michael Leahy, Domenic and Anna DiPilato, and Robinhi II Development Company, appealed their real property assessments in 2001 and 2002 to the Board pursuant to the procedures set out in Section 207. 01, et seq. of the Administrative Code of Allegheny County. The Board's hearing officers held appeals hearings for each of the Appellants and made recommendations to the Board for final resolution of their tax liability. Appellants allege that the Board considered ex parte evidence regarding market values in making the final assessments.

On August 9, 2002, Appellants filed this action pursuant to 42 U. S. C. § 1983 in the Western District of Pennsylvania seeking a declaratory judgment that Appellees, the County of Allegheny, the Board and individual Board members,[1] violated their due process rights by encouraging hearing officers to seek out ex parte evidence of market values and to consider such evidence after the hearings, without affording the property owners notice or the opportunity to respond to the new evidence. Appellants also claimed that hearing officers made arbitrary and capricious recommendations to the Board as to the assessed value of each of their properties.

The Board moved to dismiss the case on the ground that the Tax Injunction Act and principles of comity prevent federal courts from exercising subject-matter jurisdiction

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[1] The named Board members are Kevin McKeegin, Patricia McCullough, Jerry Speer, James Skinzer, Deborah Baron, and Frederick Valencenti.

over a challenge to a state tax system. Appellants responded that although the Tax Injunction Act bars federal jurisdiction over challenges to a state's assessment, levy, or collection of property taxes, it does not bar challenges to a state's post-payment appeals procedures.

The District Court referred the motion to dismiss to Magistrate Judge Ila Jeanne Sensenich for a Report and Recommendation (R&R). Magistrate Judge Sensenich issued a thorough, well-reasoned report recommending that the District Court grant the Board's motion to dismiss for lack of subject-matter jurisdiction. She reasoned that if a federal court could award damages or declare a state tax system unconstitutional, it could halt the proper functioning of state government in a manner that was antithetical to principles of comity. Judge Sensenich thus rejected Appellants' asserted distinction between the taxing power and the appeals process. Finally, Judge Sensenich found that, in light of recent additions to Pennsylvania law, Pennsylvania's courts provide a "plain, speedy, and efficient" remedy through the process for appeal of tax assessments. The District Court adopted the R& R as the opinion of the court and granted the Board's motion to dismiss for lack of jurisdiction.

On appeal, Appellants argue that 1) the Tax Injunction Act does not apply to their challenge to Pennsylvania's post-payment appeals process; 2) even if the Tax Injunction Act applies to their case, the federal courts still have jurisdiction because Appellants lack a plain, speedy and efficient remedy at state law; and/or 3) the Tax Injunction Act is unconstitutional.

II.

The Tax Injunction Act provides that "[t] he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341. Although the express language of the Tax Injunction Act only refers to injunctive actions, the Supreme Court has held that the Tax Injunction Act also prohibits federal courts from issuing declaratory judgments holding state tax laws unconstitutional. California v. Grace Brethren Church, 457 U. S. 393, 408 (1982).

A.

Appellants' first argument is that the Tax Injunction Act does not apply because they have not asked the District Court to "enjoin, suspend or restrain the assessment, levy or collection of any tax." Appellants' Br. at 10 (quoting 28 U. S. C. § 1341). Appellants argue that they only challenge the post-collection appeals process, which does not implicate the Commonwealth's ability to assess, levy, or collect taxes as described in the text of the Tax Injunction Act.[2]

As noted above, Judge Sensenich rejected their attempt to distinguish their challenge from the type of challenge covered by the Act. She concluded that:

> [appellants] ultimately [] challenge the methods used by the Board to assess property values (i. e., the Board improperly considers ex parte evidence regarding market values after the appeal hearings are

---

[2] Although Appellants' initial complaint also requested damages, they clarified during oral argument that they only seek declaratory relief, the cost of the appeal and attorneys' fees.

> concluded to determine assessment values) and not the appeal process itself. This is exactly the type of claim contemplated by Congress in enacting the Tax Injunction Act .
> . . .

App. at 15. We agree. The appeal process is directed to the Board's ultimate goal and responsibility of determining the proper amount of tax to assess – a power of "assessment" that explicitly falls within the ambit of the Tax Injunction Act. Appellants' prior payment of the tax does not change the fact that they seek to enjoin Pennsylvania's finalization of assessments or re-assessments of taxes. Appellants' attempt to distinguish the appeals process from the tax assessment is unpersuasive.

B.

The Tax Injunction Act divests federal courts of jurisdiction only if the state fails to provide a "plain, speedy and efficient" remedy in its court. Appellants argue that the federal courts have jurisdiction over this case because Pennsylvania has failed to provide a "plain, speedy and efficient" remedy at state law.

In determining whether the remedy in Pennsylvania courts is "plain, speedy and efficient," we are guided by the Supreme Court's decision in Rosewell v. La Salle National Bank, 450 U. S. 503 (1981). In Rosewell, a taxpayer challenged Illinois' real estate tax refund procedure, which required taxpayers to pay the tax first and then attempt to contest the assessment and obtain a refund. The plaintiff in Rosewell refused to pay her tax assessments because they were set at a "discriminatory level." Id. at 518 n. 22. The plaintiff filed a Section 1983 action and the defendants moved to dismiss for lack of jurisdiction. Because the Court found at the outset that the Tax Injunction Act "generally

prohibits federal district courts from enjoining state tax administration," the Court focused on the question of whether Illinois provided an adequate state remedy. Id. at 512.

In Rosewell, the Court construed "plain, speedy and efficient" to mean that a state court must meet "certain minimal procedural criteria," but it did not require that the state's remedy be the best, most convenient, or speediest one. Id. (emphasis in original); see also id. at 518-21 (stating that two-year delay in state court, although regrettable, was not so egregious that it ran afoul of the Act's requirement of a "speedy" remedy). Congress' intent in requiring that the state provide a plain, speedy and efficient remedy was to ensure that the taxpayer be afforded "a full hearing and judicial determination of the controversy," id. at 5 513 (quoting testimony of Senator Bone, 18 Cong. Rec. 1416 (1937)), and be able to appeal to the United States Supreme Court, id. (quoting S. Rep. No. 1035, at 2 (1937)).

In light of the Supreme Court's reluctance "' to interfere with the operation of state tax systems, '" and desire to "' be faithful to the congressional intent to limit drastically federal court interference with state tax systems, '" we have stated that "we must construe narrowly the 'plain, speedy and efficient' exception to the Tax Injunction Act." Sipe v. Amerada Hess Corp., 689 F. 2d 396, 404 (3d Cir. 1982) (quoting Grace Brethren Church, 457 U. S. at 412, 413).

We confronted a similar challenge to the one at bar in Behe v. Chester County Board of Assessment Appeals, 952 F. 2d 66 (3d Cir. 1991). Behe and other homeowners who claimed that Chester County violated their constitutional rights by failing to revise property assessments annually and causing differential tax burdens between property taxes on newer and older properties filed their suit in federal court pursuant to 42 U. S. C. § 1983. They argued that the

Tax Injunction Act did not divest the federal courts of jurisdiction because the Pennsylvania courts did not provide a "plain, speedy and efficient" remedy for their claim. Following an examination of the relevant causes of action and procedures for appealing tax assessments in Pennsylvania, we concluded that Pennsylvania did provide a "plain, speedy, and efficient" remedy for the purposes of the Tax Injunction Act and dismissed the case for lack of subject-matter jurisdiction. Id. at 68-71.

Shortly thereafter, we reaffirmed the continued vitality of that conclusion in Balazik v. County of Dauphin, 44 F. 3d 209 (3d Cir. 1995), where we stated:

> Upon review of the state law canvassed in Behe, we see no need to rehearse those findings here, other than to note that since that time [that Behe was decided] the Pennsylvania Supreme Court has made it easier for taxpayers to by pass existing statutory procedures and bring an action directly in state court. We hold that Pennsylvania provides a "plain, adequate and complete" remedy for § 1983 plaintiffs challenging state taxation policies.

Id. at 218 (emphasis added). Critically, Appellants point to no subsequent case law or legislation that suggests that Pennsylvania has made it more difficult to bring an action challenging tax assessment schemes in state court.

Other similarly-situated plaintiffs availed themselves of Pennsylvania's court system by filing an almost identical action to the one before us in the Court of Common Pleas of Allegheny County. In 2002, they filed a class action, challenging, inter alia, the County's alleged practice of permitting and encouraging the Appeals Board to use ex

parte evidence after hearings in violation of their due process rights. Kowenhoven v. County of 6 Allegheny. No. GD02-21763, slip op. at 1-3 (Ct. Com. Pl. of Allegheny County July 10, 2003). The Board filed preliminary objections, including a claim that an adequate statutory remedy existed. The court sustained the Board's objections and dismissed the suit because the plaintiffs had "an adequate statutory remedy, namely the appeal to the common pleas court for a de novo hearing" on their assessment disputes. Id. at 3; see also Murtagh v. County of Berks, 715 A. 2d 548, 550-51 (Pa. Commw. Ct. 1998) (en banc) (citing Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U. S. 582 (1995)) (taxpayer may not maintain Section 1983 action where state's administrative process provides adequate remedy and taxpayer failed to exhaust administrative remedy); Jordan v. Fayette County Bd. of Assessment Appeals, 782 A. 2d 642, 644 (Pa. Commw. Ct. 2001) (en banc) (same).

Appellants here allege that they do not have an adequate remedy in state court because the Court of Common Pleas of Allegheny County dismissed the Kowenhoven action. At the time that Appellants filed their briefs in this court, the Kowenhoven plaintiffs' appeal to the Commonwealth Court was still pending. They thus argued before us that the uncertainty of the pending appeal made the availability of the state court remedy questionable or less than "plain." However, since then, the Commonwealth Court issued its opinion in Kowenhoven v. County of Allegheny, 2004 WL 769711 (Pa. Commw. Ct. Apr. 13, 2004). It affirmed the trial court's order dismissing the action, agreeing that there was an adequate statutory remedy available.

However, its opinion included language that was highly favorable to Appellants, in that the court expressed concern that the Board's internal guidelines appeared to be

inappropriate. Id. at *2. On one hand, the Board sent a memo to hearing officers and case reviewers directing that when making recommendations, "Hearing Officers and Case Reviewers are not to reappraise the property or submit post-hearing evidence." Id. at *1 (quoting Allegheny County Assessment Board Apr. 9, 2002 Memo to Hearing Officers and Case Reviewers) (emphasis in original). On the other hand, the same memo also provided that "[a] Hearing Officer and Case Reviewer who has personal knowledge of an area or more suitable sales comparables to those introduced at a hearing may supply this information for the Board's consideration." Id. The Commonwealth Court characterized the latter practice as "inject[ing] an improper element into the process of adjudication," id. at *4, which "appears to fly in the face of procedural due process notions, which require that parties be afforded an opportunity to confront the witnesses against them . . . ." Id. at *2; see also id. at *4 (plaintiffs may "challenge any improperly considered evidence" and "improper evidentiary matters approved in the Board's memo are not permitted under the statute or the constitution"). The Commonwealth Court further noted that if the plaintiffs filed a de novo appeal asserting that the Board 7 accepted and relied upon evidence not permitted under the tax assessment statute, the Board "will be required to reject that improperly considered evidence and base a decision only upon evidence properly offered to the hearing officer which [the plaintiffs] had an opportunity to challenge, or such additional evidence that may be then presented." Id. at *4 (emphasis added).

The Commonwealth Court rejected the argument made by the plaintiffs that they were entitled to pretermit the administrative proceedings under Ward v. Village of Monroeville, 409 U. S. 57 (1972) (holding that plaintiff challenging constitutionality of statute authorizing quasi-judicial proceedings was entitled to due process in quasi-

judicial hearing beyond de novo appeal to trial court). However, the Commonwealth Court held that because the plaintiffs were challenging the application and interpretation of the assessment statute, rather than its constitutionality, Ward did not support their argument. Id. at *2-3; see also Jordan, 782 A. 2d at 646 (holding that attacks on the application of a statute, rather than "frontal attacks" on a statute's constitutionality, do not trigger equity jurisdiction and are appropriate for Board review). The court thus concluded that

> under the local rules applicable in this case, [the plaintiffs] have the opportunity to claim in an appeal to common pleas that the implementation of the process as enunciated in the Board's policy memo results in a violation of their procedural due process rights, or more simply to assert that the Board committed an error of law by considering such evidence.

Kowenhoven, 2004 WL 769711, at *4.

Based on the above, we reject Appellants' argument that Pennsylvania provides inadequate remedies. The Tax Injunction Act does not require that the state courts provide a favorable substantive outcome; instead, it only requires access to the state courts and an opportunity for meaningful review. Appellants' failure to obtain relief in the state courts does not impugn either the adequacy or the accessibility of the Commonwealth's courts. And the Commonwealth Court's dicta regarding the impropriety of Allegheny County's procedures suggests that the court agrees with many of Appellants' objections, but nonetheless requires that they pursue the appropriate statutory and administrative remedies in asserting those grievances. In short, Pennsylvania's requirement that dissatisfied

taxpayers pursue administrative remedies for as-applied challenges does not imply that they are without an adequate remedy.

Indeed, the Second Class County Assessment law creates a seven-member Board of Property Assessment, Appeals and Review "[i] n order to more efficiently and equitably assess and value persons, property and subjects of taxation for county purposes . . . ." 72 P. S. §§ 5452.1-2. The Board is tasked with "hear[ing] all cases of appeals from assessments, and all complaints as to assessments, errors, exonerations and refunds." 72 P. S. § 5452.4(c). The Assessment Board of Allegheny County also has promulgated procedures and practices for Appeals Hearings, including requirements that hearing officers must provide reports with factual findings, conclusions of law, and recommendations to the full Board. Kowenhoven, 2004 WL 769711, at *1 (citing Allegheny County's Admin. Code § 207. 07E). The General County Assessment Law provides further protections for dissatisfied taxpayers:

> Whenever through mathematical or clerical error an assessment is made more than it should have been, and taxes are paid on such incorrect assessment, the county commissioners, acting as a board of revision of taxes, or the board for the assessment and revision of taxes, upon discovery of such error and correction of the assessment shall so inform the appropriate taxing district or districts, which shall make a refund to the taxpayer or taxpayers for the period of the error or six years, whichever is less, from the date of application for refund or discovery of such error by the board.

72 P. S. § 5020-505.1.

Pennsylvania provides for adequate notice to taxpayers of the appeals procedures. General County Assessment Law 72 P. S. § 5020-508 requires that the Board "give written or printed notice, at least five days before the day of appeal, to every taxable inhabitant within the respective" taxable area, along with "the amount of the present assessment, valuation and ratio, the amount or sum of which he stands rated, and the rate per cent of the tax, and of the time and place of such appeal." The Board or its officers must further give notice, by advertisement in one or more local newspapers, at least three weeks before the day of appeal, of the time and place fixed for the appeal. 72 P. S. § 5020-509. Real estate owners who feel aggrieved by an assessment of their real estate may appeal from the decision of the Board of Property Assessment, Appeals and Review to the local Court of Common Pleas, and may further appeal to the Superior or Supreme Court. 72 P. S. §§ 5020-518.1-519. In short, Appellants have a fully-developed administrative and judicial apparatus through which they may grieve their claims. Because the state forum provides the procedural minimum required and "plainly" is accessible to Appellants, the state court remedy is adequate.

Appellants argue that if the federal courts were to assume jurisdiction of their claim, it would not upset the primary purpose of the Act: preventing out-of- state corporations from gaining unfair advantages in litigation. It is true that this court has previously suggested that one purpose of the Tax Injunction Act was to "deprive out-of-state corporations of an advantage over state taxpayers in being able to threaten localities with protracted injunctive litigation in federal courts which induce[] the localities to compromise their tax claims." Robinson Protective Alarm Co. v. City of Philadelphia, 581 F. 2d 371, 375 (3d Cir. 1978). However, the Supreme Court in Rosewell did not accept the notion that the above-stated concern was the sole purpose of the Act. The Court instead clarified that, "first and

foremost," the Act was designed to prohibit federal judicial interference with local tax collection. Rosewell, 450 U. S. at 522 & n. 29. As such, we reject Appellants' interpretation of the legislative intent of the Act.

C.

Lastly, Appellants argue that the Tax Injunction Act is unconstitutional to the extent that it deprives them of a forum to adjudicate their constitutional claims. This argument is baseless. Because the Tax Injunction Act only prohibits federal jurisdiction where there is a "plain, speedy, and efficient" remedy at state law, the Act clearly provides for a forum in which Appellants may grieve their alleged deprivation. Where the state forum is adequate, parties may assert their constitutional claims in state court; where the state forum is inadequate, parties may sue in federal court. Because the Pennsylvania state courts are open to Appellants, they may (continue to) pursue their constitutional claims in state court.[3]

III.

For the foregoing reasons, we will affirm the judgment of the District Court finding that it lacks subject-matter jurisdiction to review Appellants' claim.

---

[3] Because the federal courts do not have jurisdiction to review Appellants' claim, we need not address the substance of Appellants' claim regarding the use of ex parte evidence during the appeals process.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HERBERT S. GASS, JR.; JOHN ZITELLI, an individual; DIANE ZITELLI, his wife; JEFF CORSELLO, an individual; LYNN CORSELLO, his wife; MICHAEL LEAHY, an individual; DOMENIC DIPILATO, an individual; ANNA DIPILATO, his wife; ROBINHILL DEVELOPMENT COMPANY,

Plaintiffs

vs.

COUNTY OF ALLEGHENY, PENNSYLVANIA; BOARD OP PROPERTY ASSESSMENT, APPEALS AND REVIEW OF ALLEGHENY COUNTY; KEVIN McKEEGIN, an individual; PATRICIA McCULLOUGH, an individual; JERRY SPBER, an individual; JAMES SKINZER, an individual; DEBORAH BARON, an individual; FREDERICK VALENCENTI, an individual.

Defendants

Civil Action No. 02-1394
Judge Joy Flowers Conci/
Magistrate Judge Sensenich

Re: Doc. #13

[ENTERED: MAY 8, 2003]

MEMORANDUM ORDER

On August 14, 2002, this case was referred to United States Magistrate Judge Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §5 636(b!(l)(A) and (B), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation filed on March 26, 2003, recommended that the motion to dismiss for lack of subject matter jurisdiction, filed by Defendants pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all parties. Objections and response to objections have been filed to the report and recommendation. After de novo review of the pleadings and documents in the case, together with the report and recommendation, objections and response *no* objections thereto, the following order is entered:

AND NOW, this 8th day of May, 2003;

IT IS HEREBY ORDERED that the motion to dismiss for lack of subject matter jurisdiction, filed by Defendants pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, is granted.

The report and recommendation of Magistrate Judge Sensenich, dated April 14, 2003, is adopted as the opinion of the court.

/s/ JOY FLOWERS CONTI
Joy Flowers Conti
United States District Judge

cc: Ila Jeanne Sensenich
U.S. Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

HERBERT S . GASS, JE. , an individual; JOHN ZITELLI, an individual, and DIANE ZITELLI, his wife; JEFF CORSELLO, an individual, and LYNN CORSELLO, his wife; MICHAEL LEAHY, an individual; DOMENIC DIPILATO, an individual, and ANNA DIPILATO, his wife; and ROBINHILL DEVELOPMENT COMPANY;

Plaintiffs

vs.

COUNTY OF ALLEGHENY, PENNSYLVANIA; BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW OF ALLEGHENY COUNTY; KEVIN McKEEGIN, an individual; PATRICIA McCULLOUGH, an individual; JERRY SPEER, an individual; JAMES SKINZER, an individual; DEBORAH BARON, an individual; and FREDERICK VALENCENTI, an individual;

Defendants

Civil Action No. 02-1394
Judge Joy Flowers Conti/
Magistrate Judge Sensenich
RS: Doc. NO. 13

[ENTERED: APRIL 14, 2003]

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that the motion to dismiss for lack of subject matter jurisdiction (Doc. No. 13), filed by Defendants pursuant to Rule 12 (b) CD of the Federal Rules of Civil Procedure, be granted.

II. REPORT

Plaintiffs, Herbert S. Gass, Jr., John and Diane Zitelli, Jeff and Lynn Corsello, Michael Leahy, Domenic and Anna DiPilato, and Robinhill Development Company, appealed their Allegheny County [the "County"] property tax assessments for tax years 2001 and 2002 to the Board of Property Assessment, Appeals, and Review of Allegheny County [the- "Board"], pursuant to section 207.01, et *seq.* of the Administrative Code of Allegheny County. Plaintiffs contend that, in rendering its final determinations, the Board improperly considered ex *parte* evidence regarding market values after the appeal hearings were concluded. On August 9, 2002 they filed the instant complaint for damages under section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983,[1] alleging that Defendants, County of Allegheny, Pennsylvania; Board of Property Assessment, Appeals and

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1 The Civil Rights Act provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

Review of Allegheny County; Kevin McKeegin; Patricia McCullough; Jerry Speer; James Skinzer; Deborah Baron; and Frederick Valencenti, have deprived them or their rights to procedural due process and substantive due process, as guaranteed by the Fourteenth Amendment of the United States Constitution. On October 29, 2002, Defendants filed a motion to dismiss under Rule 12(b), sections (1) and (S), of the Federal Rules of Civil Procedure. For the reasons that follow, Defendants' motion to dismiss should be granted pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

> A Rule 12(b)(1) motion may be treated as either a facial or factual challenge to the court's subject matter jurisdiction. In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light roost favorable to the plaintiff. In reviewing a factual attack the court may consider evidence outside the pleadings.

Gould Electronics Inc. v. U.S., 220 F.3d 169, 176 (3d Cir. 2000.) (citing *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) (other internal citations omitted)).

Defendants challenge Plaintiffs' complaint on its face. Specifically, they argue that Plaintiffs' claims, as well as their request for damages, are barred by the Tax Injunction Act, 28 U.S.C. § 1341, and principles of comity. Section 1341 states, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

In support of their argument, Defendants rely, principally, on *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1S81), *Behe v. Chester County Bd. Of Assessment Appeals*, 952 F.2d 66 (3d Car. 19S1), and *Fair Assessment in Real Estate Ass'n. v. McNary*, 454 U.S. 100 (1981). In *Rosewell*, the Supreme Court of the United States addressed the issue of whether the process available to property owners in Illinois for contesting their property taxes, which required that they pay under protest, then obtain a refund if successful, is a "plain, speedy and efficient remedy" within the meaning of the Tax Injunction Act. 450 U.S. at 505. The plaintiff in *Rosewell*, an Illinois taxpayer, refused to pay her property taxes and brought a section 1S83 action in the district court, seeking injunctive relief for her claims that Illinois' statutory refund procedure violated her right to equal protection and due process. Id. at 510. The district court granted the defendants' motion to dismiss or the ground that it lacked jurisdiction under 23 U.S.C. § 1341 (Tax Injunction Act). *Id.* at 511. The court of appeals reversed the district court, holding that the district court had jurisdiction because the Illinois' process for challenging state tax assessments did not satisfy the "plain, speedy and efficient remedy" requirement of the Tax Injunction Act. *Id.* The Supreme Court, in reversing the court of appeals, based its analysis en the principle that "The Tax Injunction Act generally prohibits federal district courts from enjoining state tax administration except in instances where the state-court remedy is not "plain, speedy and efficient." Id. at 512. It concluded that (1) "[o]n its face, the "plain, speedy and efficient remedy' exception appears to require a state-court remedy that meets certain minimal procedural criteria; (2) the Illinois statutory refund procedure provided the taxpayer with a full hearing and the opportunity to raise any constitutional objections; and [3) the reasons supporting federal non-interference in the administration of state taxes remain as compelling now as they were in 1937, when the

Tax Injunction Act was enacted.[2] *Rosewell*, 450 U.S. at 512-27 (emphasis in original).

In *Behe v. Chester County Bd. of Assessment Appeals*, 952 F.2d SS (3d Cir. 1991) the Court of Appeals for the Third Circuit addressed the issue of subject matter jurisdiction of the district court under the Tax Injunction Act in the context of a section 1983 claim by homeowners that Chester County and its Board of Assessment Appeals violated their rights to substantive due process and equal protection under the United States Constitution and the Pennsylvania Constitution, by failing to reassess property values on an annual basis as required by Third Class County Assessment Law. 952 F.2d 66, S7-S3 (3d Cir. 1991.) The court of appeals affirmed the district court's order, which dismissed the action for lack of subject matter jurisdiction, in part, on the ground that Pennsylvania's remedy for challenging the validity of the state tax system was plain, speedy and efficient, thus their claims were barred by the Tax Injunction Act. *Behe*, 952 F.2d at 68. In reaching its conclusion, the court of appeals examined the provisions of Pennsylvania

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[2] The Court, quoting Justice Brennan in *Perez v. Ledesma*, 401 U.S. 82, 128, n.17 (1971) (Brennan, J., concurring in part and dissenting in part), reiterated those compelling reasons:

> "state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts."

law that related to procedures for appealing tax assessments and concluded that "Pennsylvania provides an adequate remedy for Homeowners." *Id.* Thus, Defendants assert that because the court of appeals has determined that Pennsylvania's process for challenging tax assessments provides an adequate remedy, a fortiori, Plaintiffs' claims are barred by the Tax Injunction Act.

In support of their argument that Plaintiffs are not entitled to pursue their claims for damages under section 1383, Defendants cite *Fair Assessment in Real Estate Ass'n v. McNary,* 454 U.S. 100 (1981), in which the Supreme Court of the United States considered whether a damages action may be brought under 42 U.S.C. § 1983 to redress the allegedly unconstitutional administration of a state tax system. In *McNary,* the plaintiffs, taxpayers from St. Louis County, Missouri, filed suit in district court pursuant to 42 U.S.C. §1983, seeking actual and punitive damages against the defendants, various local and state tax officials who they alleged had deprived them of their rights to equal protection and due process of law by taxing properties unequally. 454 U.S. 105-06. The district court held that the plaintiffs' claims were barred by the Tax Injunction Act, 28 U.S.C. § 1341 and the principle of comity. Id. at 101-02. An equally divided court of appeals, sitting en *banc,* affirmed the decision of the district court. Id. at 102. In affirming the decision of the court below, the Supreme Court of the United States held that "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." *Id.* at 116. After examining its decisions prior to the Tax Injunction Act, as well as the legislative history of the Act, its post-Act decision in *Great*

Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 2S3 (1943),[3] and its more recent recognition of the principles of federalism, the Court reasoned:

> The recovery of damages under the Civil Rights Act first requires a "declaration" or determination of the unconstitutionally of a state tax scheme that would halt its operation. And damages actions, no less than actions for an injunction, would hale state officers into federal court every time a taxpayer alleged the requisite elements of a § 1983 claim. We consider such interference to be contrary to "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts." Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court.

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[3] In *Great Lakes,* an action brought by several Louisiana taxpayers who sought "a declaratory judgment that the state tax law as applied to them was unconstitutional and void," the Court, based on principles of federalism, expanded the application of the principle of comity to include actions for declaratory judgment in addition to its application to actions requesting injunctive relief. 319 U.S. 293, 298-99.

McNary, 454 U.S. at 115-15 (quoting *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932) (internal footnote omitted)).[4]

Plaintiffs, in opposing Defendants' Motion to Dismiss, argue that the Tax Injunction Act is inapplicable to their claims because they are challenging Allegheny County's appeal process, rather than its right to "assess, levy or collect" property taxes. (Pls.' Br. at 4 (Doc. No. 16).) Specifically, they allege that Defendants' policy and practice of using ex parte evidence regarding market values after the appeal hearings are concluded to determine property assessments deprives them of their constitutional right to a fair hearing. (Id.) Significantly, they argue that any decision rendered by the Court would not interfere with Allegheny County's assessment or collection of property taxes. (Id. at 5.) Plaintiffs argument is not persuasive, however, in light of the Supreme Court's decision in *Rosewell* and its reasoning in *McNary*, discussed supra at pages 3-8. Particularly, in *Rosewell*, the Supreme Court used the Tax Injunction Act to bar constitutional claims that a state's statutory refund procedure violated a taxpayer's right to equal protection and due process because it determined that the taxpayer had a "plain, speedy and efficient" state-court remedy for addressing her claims. In *McNary*, the Court applied the principle of comity to bar a section 1983 suit where taxpayers sought actual and punitive damages against various local and state tax officials who they alleged had deprived them of their rights to equal protection and due process of law by taxing their properties unequally. 454

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[4] The Court noted that it found no significant difference between remedies which are "plain, adequate, and complete" and those which are "plain, speedy and efficient" within the meaning of section 1341 because "[b]oth phrases refer to the obvious precept that plaintiffs seeking protection of federal rights in federal courts should be remitted to their state remedies if their federal rights will not thereby be lost." 454 U.S. at 116 n.8.

U.S. 105-06. It reasoned that inherent in a claim for recovery of damages under section 1983 is a determination by the court that a state tax scheme is unconstitutional, a determination that would halt the taxing operation. The Court further reasoned that damages actions, like actions for an injunction, would still result in state officers being haled into federal court every time a taxpayer alleged the requisite elements of a section 1983 claim, a consequence contrary to the Court's pronounced regard for the principles of comity and federalism in matters of state taxation. Moreover, although Plaintiffs' claims are distinguishable from those claims addressed by the Supreme Court in *Rosewell, and McNary,* and by the Court of Appeals for the Third Circuit in *Behe,* ultimately they challenge the methods used by the Board to assess property value, that the Board improperly considers ex parts evidence, and that their market values after appeal hearings are [illegible] and not the appeal process itself, [illegible] contemplated by Congress [illegible] federalism dictate that the state courts have the opportunity to address, provided that a "plain, speedy and efficient" remedy is available to Plaintiffs.

Plaintiffs argue that, even assuming the Tax Injunction Act governs this action, the "plain, speedy and efficient" remedy requirement of the Act is not satisfied by the County's and the State's appeal process. (Pls.' Br. at 5-6 {Doc. No. 16).) Conversely, as stated *supra* at page 6, Defendants assert that because the Court of Appeals for the Third Circuit, in *Behe,* determined that Pennsylvania's process for challenging tax assessments provides an adequate remedy. Plaintiffs' claims here are barred by the Tax Injunction Act. However, Pennsylvania's assessment appeal process has been revised since the 1991 court of appeals' decision in *Behe* with the adoption by County voters on May 19, 1998 of the Home Rule Charter and the

enactment by County Council of Ordinance No. 15. These revisions necessitate a brief explanation of the revised process for appealing property tax assessments.

Assessments and assessment appeals in counties of the Second Class (Allegheny County is a County of the Second Class), are governed by Title 72 of Pardon's Pennsylvania Statutes, specifically sections 5452.1 et *seq.* Section 5452.1 creates a Board of Property Assessment, Appeals and Review. Section 5452.4, subsections (a) and (c), respectively, enumerates the powers and duties of the Board of Property Assessment, Appeals and Review, which include, in part, the duty "[t]o make and supervise the making of all assessments and valuations of all subjects of taxation in the county as required by existing law" and the duty [t]o hear all cases of appeals from assessments, and all

enacted Ordinance No. 15, which added three chapters to the Administrative Code of Allegheny County, Chapters 205, 207, and 209, cresting a new assessment system different from the one established by 72 P.S. § 5452.1 et *seq.* 149 PITTSBURGH LEGAL J. 255 (opinion of Wettick, J. July 25, 2001) . Specifically,

> Ordinance No. 15 created a new assessment system that differs from the assessment system created through the Second Class-County Assessment Law. The new system replaced the existing Assessment Board with three entities that now perform the various functions that were performed by the Assessment Board under the Second Class County Assessment Law. Chapter 205 created a Property Assessment Oversight Board that recommends assessment

> standards and practices to County Council, that confirms or rejects the appointment of the Chief Assessment Officer, and that certifies that assessments determined by the Office of Property Assessments have been made in accordance with the County's Assessment Standards and Practices Ordinance. . . .
>
> Chapter 207 created a new Board of Proper-y Assessment Appeals and Review whose duties are limited to the oversight of assessment appeals, including the hearing of appeals."...
>
> Chapter 209 created an Office of Property Assessments that makes and supervises the making of all assessments and valuations of ail subjects of real property taxation. Under Chapter 209, the Chief Assessment Officer is ultimately responsible for making or supervising the making of all assessments and valuations in accordance with law, ordinance, and industry standards and for ensuring the annual revision, and equalization of all such assessments and valuations.

Id. In 2000, Judge Wettick, of the Court of Common Pleas of Allegheny County, ruled that "the Home Rule Charter permitted the County to replace the assessment system created by the Second Class County Assessment Law with the assessment system set forth in County Ordinance No. 15. Id. at 256 (see *Board of Property Assessment, Appeals and Review v. County of Allegheny*, 148 P.L.J. 284 (2000), *aff'd*, 773 A.2d 81S (Pa. Commw. Ct. 2001)).

Rule A503 of the Allegheny County Rules of Court governs all tax assessment appeals from decisions of the Board of Property Assessment, Appeals and Review. ALLEGHENY COUNTY RULES OF COURT (2002, Rule A502(a). The content of the appeal requires "a concise statement of the reasons for the appeal; . . . . "[5] Id., Rule A503(c)(iii). Further, Rule A503 provides in relevant part,

> All tax assessment appeals from decisions of the Board of Property Assessment, Appeals and Review shall be assigned to a Board of Viewers appointed by the Administrative Judge of the Civil Division pursuant to 72 P.S. 5020-518.1.

Id., Rule A503(h).[6] Rule A503 also requires that all motions in raal estate tax assessment appeals be presented to the Real Estate Tax Appeal Judge. *Id.*, Rule A503(g) . In addition, ths Rule permits parties seeking discovery in cases involving residential property to petition the Real Estate Tax Appeal Judge, who may refer the petition for discovery to the Administrative Chairman of the Board of Viewers for recommendation. *Id.*, Rule A503 (I) (2). All appeals are Chen conciliated before a hearing by a panel of the Board of Viewers. Id., Rule A503(j)(l). At the time conciliation, the

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5 The form corresponding to Rule A503(c)(2), Time for and Content of Appeals, provides several standard reasons for the appeal, as well as "any other known reason" and "other such reasons as will be developed at the time of hearing." ALLEGHENY COUNTY RULES OF COURT (2002) at 154-55 ¶6, subparagraphs (d) and (e).

6 Courts of common pleas are authorized to refer appeals from the Board of Property Assessment Appeals and Review to boards of viewers under 42 Pa.C.S. Ch. 21 Subch. E, in accordance with rules and procedures prescribed by such courts. 72 P.S. § 5020-5181.1(c).

Board of Viewers may recommend to the Administrative Judge that the appeal be placed on the non-jury trial list if it determines that the interests of justice will not be served by continuing the proceedings before it, in which, case all further proceedings would be governed by the Pennsylvania Rules of Civil Procedure and Local Rule 249 III. Id., Rule A503(j)(4). If the Board of Viewers retains jurisdiction of the case and it is not settled at the conciliation, the Board of Viewers is required to schedule a bearing and provide notice of the hearing to all parties. ALLEGHENY COUNTY RULES OF COURT (2002), Rule A503 (1) (l). After the hearing is concluded, the Board of Viewers files a report and recommendation with the court of common pleas, which, may either accept the report, or remand it to the Board of Viewers for further proceedings. Id., Rule A503(m). If the court accepts the report and recommendation of the Board of Viewers, the parties are allowed ten days to file objections and are required to file a brief in support of their objections. Id., Rule A503(n-o)- Upon motion by the party or parties filing objections, the court is required to schedule oral argument. Id., Rule A503(g). If none of the parties file objections to the Report and Recommendation, it becomes the final Order of Court. *Id.*, RuleA503(r). Finally,

> [a]ny owner of real estate or taxable property in this Commonwealth., or any county, city, borough, town, township, school district or other public corporation having power and authority to levy taxes on the assessment of his real estate or taxable property in question, may appeal the judgment, order or decree of any court of common pleas, in any matter affecting the assessment of taxes on said property: Provided, That the appeal shall not prevent the collection of the taxes upon the assessment affixed or allowed by such

> judgment, order or decree of the court; of common pleas, but in case the same shall be reduced, then the excess shall be returned to the person [] or persons who shall have paid the same.

72 P.S. § 5020-519 (1995).

Plaintiffs argue that irregularities in the above described appeal process prevent meaningful review of their claims and the fact that Pennsylvania law provides for de novo review in "he Court of Common Pleas does not correct this deficiency and that they cannot conduct a meaningful appeal because they are not given access to the additional *ex parte* evidence utilized by the Board in determining an assessment. However, these arguments are without merit. Pennsylvania's current tax assessment appeals process provides essentially the same protections as those discussed by the court of appeals in *Behe*, a process that the court determined satisfied' the "plain, speedy and efficient remedy" standard required by the Tax Injunction Act when it affirmed the district court's dismissal of the complaint for lack of subject matter jurisdiction. In addition, Plaintiffs have not pointed to any Pennsylvania case law that supports its argument that an adequate remedy is not available to them in the state courts. Furthermore, in light of the fact that Rule A503 (I) (2) of the Allegheny County Court Rules provides a method for obtaining discovery, Plaintiffs' have not demonstrated that they axe prevented from conducting a meaningful appeal because they do not have access to the additional ex parte evidence utilized by the Board in determining an assessment.

Plaintiffs also assert that they do not have an adequate remedy under stats law for satisfaction of their claims. They rely on the case of *Tatten Partners v. New Castle*

County to support their assertion. They identify it as a decision from the Superior Court of Pennsylvania that held that the Superior Court was without authority to hear a section 1983 claim brought pursuant to an assessment appeal because the claim had not been raised before the assessment board. However, Plaintiffs are mistaken in identifying the case as a Pennsylvania case. In fact, *Tatten Partners, L.P. v. New Castle* County *Bd. of Assessment Review,* 642 A.2d 1251 (Del. Super. Ct. (1993)) was decided in the Superior Court of Delaware and was based on that state's assessment appeals process. Therefore, it has no relevance to the instant case, which challenges Pennsylvania's appeals process.

Based on the above discussion, this Court lacks subject matter jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341 and principles of comity. Therefore, Defendants' motion to dismiss all claims pursuant to Rule 12 (b)(1) of the Federal Rules of Civil Procedure should be granted. Because dismissal of this action is required based on lack of subject matter jurisdiction, it is not necessary to address Defendants' argument that the claims against the individual Board members are barred by absolute "quasi-judicial immunity.

III. CONCLUSION

It is recommended that the motion to dismiss for lack of subject matter jurisdiction (Doc. No. 13), filed by Defendants pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, be granted.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b) (1) (B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation. Any party opposing the objections shall

have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

/s/ ILA JEANNE SENSENICH
ILA JEANNE SENSENICH
U.S. Magistrate Judge

Dated: April 14, 2003

cc: The Honorable Joy Flowers Conti
United States District Judge

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